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No. 46. No record available.
No. 563. Govt. had no interest in the case.
No. 555. Special Counsel employed (Mr. Pomerene and Mr. Justice Roberts) and we have no briefs.
No. 304. No brief filed by U.S. - abide decision in 238.

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 44

GEORGE W. P. HUNT, AS GOVERNOR OF THE STATE of Arizona; D. E. Pettis, as Game Warden of the State of Arizona; Frank Harrison, etc., appellants

v.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 109) is reported in 19 F. (2d) 634.

JURISDICTION

The judgment of the District Court was filed June 27, 1927. (R. 125.) The petition for appeal was filed September 23, 1927 (R. 128), and the appeal was allowed September 26, 1927. (R. 134.) The decree was entered upon a final hearing before

three judges who had previously heard and denied the application for an interlocutory injunction. (R. 126, 127.)

The suit was brought by the United States against officials of the State of Arizona to restrain them from enforcing the game laws of Arizona as construed by them, upon the ground of their unconstitutionality in so far as they conflicted with regulations made by the Secretary of Agriculture under Acts of Congress relating to the Kaibab National Forest, and which regulations directed the reduction of the number of deer in order to prevent serious damage to the forest through overbrowsing by the excessive number of deer on the reserve.

The right of direct appeal to this Court rests upon Sections 266 and 238 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Secs. 380, 345). *Ex parte Buder*, 271 U. S. 461; *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317; *Smith* v. *Wilson*, 273 U. S. 388.

QUESTIONS PRESENTED

The principal question is whether officers of the United States, acting pursuant to Acts of Congress, and regulations of the Secretary of Agriculture promulgated thereunder, notwithstanding State game laws, may kill deer in a national forest on the public domain for the purpose of reducing the number of deer to prevent serious damage to the forests from overbrowsing by the excessive number of deer on the reserve.

STATUTES INVOLVED

Article IV, Section 3, of the Constitution of the United States provides:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

The Act of June 4, 1897 (c. 2, 30 Stat. 11, 35; U. S. C. Title 16, Sec. 551), provides:

> The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; * * *.

The Forest Transfer Act of February 1, 1905 (c. 288, 33 Stat. 628), transferred this authority to the Secretary of Agriculture.

On October 24, 1925, the Secretary of Agriculture issued the following regulation (R. 14):

> UNITED STATES DEPARTMENT OF AGRICULTURE
> Office of the Secretary
> Washington, D. C.
>
> REGULATION
>
> *Permitting the Killing of Deer on Grand Canyon National Game Preserve by Employees of and Persons Cooperating with the Department of Agriculture*
>
> *Whereas*, it has been determined that the deer on the Grand Canyon National Game

Preserve, in the Kaibab National Forest, established under authority of the Act of June 29, 1906 (34 Stat. 607), by Proclamation of the President on November 28, 1906 (34 Stat. 3263) as modified by Proclamations of the President on June 23, 1908 (35 Stat. 2192) and June 3, 1909 (36 Stat. 2496), and by the Act of February 26, 1919 (40 Stat. 1178), have increased to such an extent that they have caused and are causing serious damage and injury to the range and timber on said game preserve and national forest and have reduced and are reducing the forage for the deer on said game preserve to such an extent that starvation of the deer is imminent; and

Whereas, reduction in the number of deer on said game preserve is essential to the protection of the aforesaid property of the United States and to the perpetuation of the deer in numbers consistent with the forage capacity of the range; and

Whereas, the capture and shipping of live deer for restocking other areas and for scientific and other purposes, and the opening up of the game preserve to hunting under the restrictive provisions of the laws of the State of Arizona, have been resorted to as a means of relief and have been found to be wholly inadequate:

Now, Therefore, I, William M. Jardine, Secretary of Agriculture, pursuant to the authority in me vested by the Act of February 1, 1905 (33 Stat. 628), amendatory of the Act of June 4, 1897 (30 Stat. 11) and Section

2 of the said Act of June 29, 1906 (34 Stat. 607), do hereby authorize and direct employees of the Department of Agriculture and persons cooperating with said Department to remove deer from said Grand Canyon National Game Preserve, in such manner and number and under such conditions as the Forester shall find to be necessary for the protection and preservation of said property of the United States and the forage capacity of the preserve for deer. Deer captured or killed under this regulation shall be disposed of in such manner and for such purposes as the Forester shall find to be practicable.

In Witness Whereof I have hereunto set my hand this 24th day of October, 1925.

[SEAL.] W. M. JARDINE,
Secretary of Agriculture.

STATEMENT

The case was heard on the bill of complaint, answer, and exhibits, and upon various affidavits which it was stipulated should be received in evidence. (R. 30.) The bill alleged, and the court found, that the number of deer in the Kaibab National Forest had increased to such an extent that the pasturage was insufficient and the deer were damaging or destroying the young trees, and were in considerable numbers dying of starvation, and that to protect the forest from serious injury it was necessary to kill a large number. It was alleged in the bill, and found by the court, that the defendants, officials of the State, claimed that no deer

could be killed on the National Forest except as provided in the State game laws and were threatening to interfere with Federal officers and prosecute them for destruction of deer in violation of the State game laws.

The court held that Congress had power to enact legislation for the protection of the public domain, that the destruction of a large number of deer was necessary for that protection, that the State game laws could not operate within the National Forest so as to conflict with valid Acts of Congress and regulations thereunder, and it restrained the State officials from attempting to enforce the game laws of the State in respect of officers, agents, or employees of the United States on account of acts done in carrying out the regulations and orders of the Secretary of Agriculture for reducing the number of deer in the forest and for the removal of the carcasses to places within or without the State. The decree was qualified by the provision that (R. 125):

> This decree shall not be construed to permit the licensing of hunters to kill deer within said Forest or Preserve in violation of the Game Laws of the State of Arizona.

Section 24 of the Act of March 3, 1891 (c. 561, 26 Stat. 1095, 1103; U. S. C. Title 16, Sec. 471), provides:

> That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the

public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

On February 20, 1893, the President, by proclamation, set apart and reserved a large body of lands of the United States situated in what are now known as the Coconino and Mohave counties, Arizona, as a public reservation, thereafter known as the Grand Canyon Forest Reserve (27 Stat. 1064), and by proclamation of July 2, 1908 (35 Stat. 2196), allocated certain parts of these lands to other forest reserves, retaining approximately 722,464 acres, involved in this suit, under the designation of Kaibab National Forest. There had been established the Grand Canyon National Game Preserve (34 Stat. 3263), under the Act of June 29, 1906 (c. 3593, 34 Stat. 607; U. S. C. Title 16, Secs. 684, 685), which authorized the President to create a game preserve in the Grand Canyon Forest Reservation, and provided that the killing of game animals on the lands of the United States within the limits of said area "shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture."

The boundaries of the Grand Canyon National Game Preserve and the Kaibab National Forest are nearly, but not quite, identical. (Map, R. 19.)

The game laws of Arizona (Revised Statutes of Arizona, 1913, Penal Code, Title XVIII, page 134, as amended by the Initiative Act of November 7, 1916, page 5, initiative and referendum measures, Session Laws of Arizona, 1917) provided for an open season only from October 1 to November 1, and a bag limit of one male deer, and made it a criminal offense to otherwise kill or to transport deer from the State, and exacted a license fee from all hunters.

The record clearly establishes that the number of deer on this reservation have increased to such an extent as to make the pasturage inadequate.

Controversy having arisen as to the conditions, the Secretary of Agriculture in 1924 appointed a committee, consisting of the President of the American Game Protective Association, the President of the National Association of Audubon Societies, the Secretary of the American National Live Stock Association, and a representative of the Boone and Crockett Club, to investigate and report. (R. 36–42.) These men spent the period from August 16 to August 26, 1924, in the preserve, investigating the condition of the deer and the condition of the forest. Their report to the Secretary of Agriculture, and their testimony in the record, is to the effect that there were at least 26,000 deer on the preserve and that the pasturage was not sufficient to support the deer in a thrifty condition, and that serious damage was being done to the forest. They found that seri-

ous damage had been done by "overbrowsing of yellow pine, white fir, Douglas fir, and spruce seedlings," and that on large areas "coniferous seedlings had been killed by the deer browsing and the small coniferous reproduction stunted to such an extent that the trees appeared almost dead. Large areas of the summer range covered with aspen, locust and oak brush have been denuded of reproduction by the deer. On the west side of the Kaibab Plateau in the area of winter deer concentration the deer have overbrowsed and seriously damaged the oak brush, locust, buck brush, pinon, pine and juniper." (R. 40.) They said:

> The overbrowsing of the areas mentioned was so serious in August of 1924 that the committee believed the deer would ultimately cause the destruction of the range if not artificially checked by the thinning out of the herd.

They testified that—

> Almost all the deer observed by the committee were in poor physical condition. The outline of the ribs could easily be seen through the skin of all the deer, and many does with fawns were in a deplorable condition. (R. 40.)

They were convinced that—

> immediate action to reduce the number of deer was a necessity in order to restore the range in the forest to normal conditions and in order to make a suitable balance between

the amount of forage available and the number of deer in the Preserve. (R. 41.)

They recommended that the number of deer be reduced 50 per cent (R. 41), and reached the conclusion that the area within the Grand Canyon National Game Preserve will never furnish sufficient browsing to feed permanently the number of deer that were on the Preserve in August, 1924.

They recommended (R. 42):

1. Trapping and shipping deer alive to other localities to be used for restocking purposes.

2. That an effort be made to drive the deer off the Preserve to the adjoining country for restocking purposes.

3. If the first two methods fail to accomplish the needed reduction, that the Preserve be opened to hunting by sportsmen under regulations to be prescribed by the Secretary of Agriculture.

4. If all of the above methods should prove inadequate to accomplish the desired end, the committee recommended to the Secretary of Agriculture that the government kill as many deer as was necessary to accomplish the desired end, utilizing the meat and hides to the best available economic advantage.

Much other testimony to the same effect as to the conditions in 1924 and 1925 was presented. (R. 34, 61, 66, 73, 80, 87, 94, 95.)

Some witnesses for the defendants presented affidavits stating that they had been upon the reser-

vation at different times and the deer they had observed were fat and they had not seen any damage to the Forest (97–107), but the evidence for the plaintiff was overwhelming.

On October 2, 1924, the then Secretary of Agriculture issued a regulation authorizing the removal from the Preserve of such numbers of deer and in such manner and for such purposes as in the opinion of the Forester would best preserve conditions favorable to the maintenance of the supply of deer. (R. 8.)

In November, 1924, the Secretary of Agriculture gave G. M. Willard, a game commissioner of Arizona, a permit to drive 5,000 deer from the Preserve, and an attempt was made with a large force of men to make the drive, but it was unsuccessful, as the deer could not be driven. Some effort was made later, in 1924, to kill deer under the supervision of the Forest officers, but only about 675 were removed. (R. 6, 12.)

On September 17, 1925, the Governor of Arizona issued an Executive Order asserting ownership of the State in the deer on the Kaibab Game Preserve and that any removal of deer from the Reservation would have to be made—

> with the definite understanding that all the laws of the State of Arizona for the protection and conservation of game animals be observed including license fees, bag limit, and that the deer be taken within the season fixed by the initiative measure adopted by the people of Arizona. (R. 12.)

Thereafter, on October 24, 1925, the Secretary of Agriculture issued the regulation set forth above, in which he recited that the removal of deer was necessary for the protection of the Forest and directed the Forester to proceed to reduce their number accordingly. The killing and removal of some 10,000 deer will be necessary.

That the officials of the State charged with the enforcement of the State game laws threatened to prosecute officers of the United States who kill or remove deer contrary to the provisions of the Arizona Game Laws is established. (R. 16, 25, 35.)

Thereupon, on February 6, 1926, the United States brought this suit to restrain the State officials from attempting, under assumed authority of the Arizona statutes, to interfere with the proposed action of the Federal officials in reducing the number of deer.

SUMMARY OF ARGUMENT

The Constitution gives to Congress power to legislate for the protection and preservation of the forests on the public domain. Congress has enacted legislation authorizing the Secretary of Agriculture to preserve the forests and make regulations respecting them, and the action of the Secretary in providing by regulation for the reduction of the number of deer on the Kaibab National Forest is authorized by Act of Congress. Such legislation authorized by the Constitution is the supreme law of the land, and the statutes of the State enacted in the exercise of its police power may not operate

on the public domain if in conflict with the legislation by Congress for the protection and preservation of the property of the United States.

The fact that the deer are so numerous as to seriously damage the forests was clearly established and found by the court below, and the killing of deer by officers, agents, and employees of the Federal Government, acting under the direction of the Secretary of Agriculture, for the purpose of so reducing their numbers as to preserve the forests, and the removal of the carcasses by such agents and officials, may not be interfered with by the State authorities.

ARGUMENT

There can be no doubt as to the proper disposition of this case. With respect to the public domain the United States is a proprietor, but it is more. It is also a sovereign with powers of legislation, and the Constitution gives Congress power to legislate for the regulation and protection of the public domain and the property of the United States thereon. Another section of the Constitution makes it and all laws enacted pursuant to it the supreme law of the land. It follows that any legislation by Congress for the protection and preservation of the public domain is superior to any State legislation in conflict with it.

That Congress may legislate for the protection of the public domain, even though that legislation may involve an exercise of what is known as the police power, is established. *Camfield* v. *United States*, 167 U. S. 518, 526.

In *Utah Power & Light Company* v. *United States*, 243 U. S. 389, it was said, at page 404:

> * * * for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them.

In *McKelvey* v. *United States*, 260 U. S. 353, 359, it was said:

> It also is settled that the States may prescribe police regulations applicable to public land areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments.

In *United States* v. *Alford*, 274 U. S. 264, it was held that Congress has power, in order to protect the forests upon the public domain, to make it a penal offense to build and to fail to extinguish a fire outside of the public domain but near a forest on the public domain.

The contention of the appellants that, because of the game laws of the State of Arizona restricting the killing of deer, the United States must remain inactive and allow the forests on its public domain to be seriously damaged, if not destroyed, is without any support in the decisions of this Court.

State courts have held that a private proprietor may kill wild game when necessary to protect his property, and that State game laws, if construed to prevent it, would be invalid. *Aldrich* v. *Wright*, 53 N. H. 398; *State* v. *Ward*, 170 Iowa 185; *State* v. *Burk*, 114 Wash. 370; Compare *Barrett* v. *State*, 220 N. Y. 423. The United States, as a proprietor, is surely in as strong position as a private owner of property.

It is not necessary to consider any other contentions that have been made as to whether the United States owns the deer on its national forest reserves, or whether it may permit the deer to be killed in excess of the limitations of the State game laws if necessary to keep the deer in a healthy condition, or for other reasons. It is sufficient for the purposes of this case that the reduction in the number of deer is necessary to protect the forests.

The decree of the lower courts restrains the State officials from interference with officers, agents, or employees of the United States in the killing of deer and the removal of their carcasses to points within or without the State of Arizona. The decree provides that it—

> shall not be construed to permit the licensing of hunters to kill deer within said Forest or Preserve in violation of the Game Laws of the State of Arizona. (R. 125.)

This provision, if construed to mean that the Federal authorities, in reducing the number of deer, may not avail themselves of the assistance of hunters who are not in the employ of the Federal Government, is open to serious question. The fact that the United States did not appeal because of this provision of the decree should not be taken as a concession on its part that this provision of the decree was justified. We doubt if any such limitation on the exercise by the United States of its power to protect its property, by reducing the number of deer, can be supported. If the United States has the right to reduce the number of deer, it may not be limited to using the services of its own employees, and it may reasonably be contended that it should be permitted to use the services of others who are willing to come on the Reservation and kill deer for their own pleasure or amusement and without expense to the United States. However that may be, the United States has not felt justified in extending the controversy over the matter and is satisfied with the decree as it stands, which permits officers, agents, and employees of the United States to kill the deer to protect the forests and permits the removal and disposition of their carcasses under the direction and control of officials or agents of the United States, without interference from the State officials.

It was also contended by the State authorities that the suit was one against the State of Arizona,

which had not consented to be sued, but that contention is so devoid of merit as not to require argument.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

R. W. WILLIAMS,
Solicitor of the Department of Agriculture.

ROBERT P. REEDER,
Attorney.

OCTOBER, 1928.